Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1978
No. 79-1133

SANDRA LOU CLAWSON, Administratrix of the Estate of RONALD EUGENE CLAWSON, Deceased, and SANDRA LOU CLAWSON, in her own right,

Petitioner,

v.

INTERNATIONAL HARVESTER COMPANY,

Respondent,

v.

GRANT STEEL CORPORATION, a corporation.

Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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STATEMENT OF THE CASE

This statement of the case is necessary to correct an inaccuracy and an omission in the statement of the Petitioner.

First, Petitioner incorrectly states that the Hough payloader backed into the gondola car. There is conflicting deposition testimony that the gondola car crashed into the payloader.

Secondly, Petitioner has failed to disclose that a Petition for Rehearing was filed with the Court of Appeals for the Third Circuit and again, denied.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER CAN RAISE AS A CONSTITUTIONAL ISSUE, THE RIGHT TO A JURY TRIAL, WHERE THIS ISSUE HAS NEVER BEEN RAISED EITHER IN THE DISTRICT COURTS OR IN THE THIRD CIRCUIT COURT OF APPEALS?

Not raised in the courts below.

II. WHETHER THE SUPREME COURT CAN UNDERTAKE TO REVIEW CONCURRENT FINDINGS OF FACT BY TWO LOWER COURTS IN THE ABSENCE OF A VERY OBVIOUS AND EXCEPTIONAL SHOWING OF ERROR?

Not raised in the courts below.

III. WHETHER PETITIONER, IN OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, MAY RELY ON CONCLUSORY AND UNSUPPORTED ALLEGATIONS IN MEETING THE BURDEN OF PRESENTING A GENUINE ISSUE OF MATERIAL FACT?

Answered in the negative in the court below.

REASONS FOR NOT ALLOWING THE WRIT

Petitioner contends that the District Court committed two fundamental errors of law in holding that the plaintiff had the burden of presenting a genuine issue of material fact.[1]

The District Court held that in opposing defendant's Motion for Summary Judgment, the plaintiff was not entitled to rely on conclusory, unsupported allegations in presenting a genuine issue of material fact regarding the absence or inadequacy of safety devices.[2]

> When a Motion for Summary Judgment is made and supported as provided under this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Fed. R. Civ. P. 56(e)

In the District Court's Opinion, Judge McCune succinctly noted that the only affidavit in opposition to the Motion for Summary Judgment, was that of Petitioner's expert. This affidavit contained no facts and the District Court held that conclusory and unsupported allegations were insufficient to oppose a Motion for Summary Judgment. The District Court correctly adhered to the principles of the Federal Rules of Civil Procedure requiring affidavits to be filed which contain *facts* in opposition to a Motion for Summary Judgment.

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[1]Petitioner first raised this issue as to the burden of presenting a genuine issue of material fact in its Petition for Rehearing. This issue was never raised in the District Court or in the original appeal to the Third Circuit Court of Appeals.

[2]The District Court's Opinion is attached to the Petitioner's Petition for Writ of Certiorari. (See Appendix "A", p. 5(a))

Petitioner avers the District Court substituted trial by affidavit for trial by jury, thus effectively denying plaintiff her Seventh Amendment constitutional right to have her case placed before a jury. Obviously, any time summary judgment is entered in favor of any party, this argument could be raised. Petitioner overlooks the very purpose of summary judgment. Summary judgment is a vehicle to pierce the allegations of the pleading in order to determine whether a genuine issue as to any material facts actually exist.

The 1963 Amendment to Rule 56(e) deals with this situation and requires a response from the non-moving party when a Motion for Summary Judgment is made and properly supported by affidavits and other materials which demonstrate that no triable issues of fact exist. While the burden remains on the moving party to clearly establish the lack of any triable issue in moving for a summary judgment, where the movant sustains his burden, the amended rule requires adequate rebuttal by the non-moving party, even if only to show, pursuant to Rule 56(f), why opposing material is presently unavailable. Petitioner has failed to offer any responsive material demonstrating any triable issues of fact, or why such opposing material is presently unavailable.

The reason for not allowing the Writ is that, on the merits, the lower court has not departed from the acceptable and usual course of judicial proceedings, nor rendered a decision in conflict with a decision of another court. This Court should not entertain this Petition for a Writ of Certiorari.

Further, this Petition should not be allowed on the Petitioner's allegations that the Court of Appeals rendered a decision in direct conflict with the prior decisions of this Court and with decisions of all other United States Courts of Appeal. Again, in reviewing Federal Rule of Civil Procedure 56, dealing with summary judgment, it is clear that the Court

of Appeals for the Third Circuit, did not abuse its discretion in affirming the District Court's decision. The Third Circuit Court of Appeals' affirmance of the District Court's decision is consistent with other Circuit Courts of Appeals' decisions.

In *Schreffler v. Birdsboro Corp.*, 490, F.2d 1148, 1154 (3d Cir. 1974), the court held:

> It matters little whether the plantiff's claim be under Section 402A or negligence because the requirement under both theories is that the defendant's conduct or the defect in its product or design *be a proximate cause of the accident*. Here it is clear that the test was not met. While it is generally true that proximate cause is question for the jury, it is not invariably so. *Where the critical facts are not in issue, the trial judge properly should rule on the question.* (emphasis added)

In *Schreffler, supra*, the Third Circuit Court of Appeals ruled that no disputed material facts existed. Therefore, the only decision remaining was the legal effect of any facts. The trial judge should properly rule on this question, since it becomes one of law. Therefore, the only decision for the trial court judge in that case was the legal effect of any facts. In the case at bar, Judge McCune, as the trial judge, properly found that there were no disputed material facts. All that remained for Judge McCune was the legal effect and Summary Judgment was properly granted.

Where the Court of Appeals affirms the decision of the District Court, the Supreme Court should not undertake to review these concurrent findings of fact, except in the situation where a very obvious, exceptional error is shown. *Berenyi v. District Director, Imm. and Nat. Serv.*, 385, U.S. 630, 636 (1967).

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no emperical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues."

In the absence of a demonstrable, clear error, the reviewing courts will not reverse findings of the trial court. *Sims Consolidated, Ltd. v. Irrigation and Power Equipment, Inc.*, 518 F.2d 413 (10th Cir. 1975). To review the granting of Respondent's Summary Judgment, the Supreme Court would be required to speculate as to the ultimate findings of fact, where the District Court, affirmed by the Court of Appeals, succinctly stated that there were no material facts at issue.

Petitioner has cited *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967), for support of her arguments. There, the District Court's granting of summary judgment was reversed and remanded, since the moving party had failed to meet its burden in showing that no factual issues existed. In that case, summary judgment was filed after three depositions of plaintiff's representatives. The Court acknowledged that none of the deponents seemed to have any knowledge regarding the basic allegations of this lawsuit and as such, it was fantasy to say that these depositions made it quite clear what the truth was. The distinguishing feature, is that, in the instant case, the dependents had considerable knowledge of the events surrounding the accident, as did Petitioner's expert. However, no triable issues of fact existed, with regard to the Motion for Summary Judgment.

Finally, Petitioner raises the constitutional issue of the alleged deprivation of plaintiff's right to a trial by jury, in granting summary judgment. However, it is horn book law that this right exists merely for the determination of a case or controversy. If there is no controversy, then the right to a jury trial does not exist. Examination of the underlying concept of summary judgment reveals that the purpose of this Federal Rule of Civil Procedure is to eliminate lawsuits wherein no factual disputes exist, i.e. controversy. Where no dispute or controversy exists, there is no need for trial by jury. Thus, the constitutional right does not arise.

In *U.S. v. Stangland*, 242 F.2d 843, (7th Cir. 1957), the Seventh Circuit Court of Appeals relied on an earlier decision of the Supreme Court of the United States.

> "... Surely, the granting of a Motion for Summary Judgment where there is no genuine issue of fact is not a denial of the right to trial by jury guaranteed by the Seventh Amendment. *Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315, 223 S.Ct. 120, 47 L.Ed. 194." at 848.

Recognizing the earlier Supreme Court mandate, the Petitioner's Writ should not be allowed.

The last reason for not allowing the Writ is that Petitioner initially advanced this constitutional question, the right to trial by jury, in her Petition for Writ of Certiorari. In addition, Petitioner raised the issue with regard to the burden of presenting a genuine issue of material fact in her Petition for Rehearing before the Third Circuit Court of Appeals. Clearly, under the decisions rendered by this Court, the Supreme Court will not ordinarily consider issues raised before it, for the first time, and never considered by the Court of Appeals. Generally, this Court refuses to consider such issues. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, (1970); *U.S. v. Ortiz*, 422 U.S. 898, (1975).

CONCLUSION

Petitioner has had her day in Court. Summary judgment is proper for the dismissal of meritless claims. In a Petition for Writ of Certiorari, new issues are proscribed and should not be considered.

Respondent respectfully requests that this Court affirm the judgment of the Third Circuit Court of Appeals.

Respectfully submitted:

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